

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	No. 2:14-cr-00264
	:	
v.	:	
	:	Date: January 5, 2015
DENNIS P. FARRELL &	:	
GARY L. SOUTHERN,	:	
	:	
Defendants.	:	
	x	

PARTIAL TRANSCRIPT OF MOTIONS HEARING HELD  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government:	AUSA PHILIP H. WRIGHT AUSA LARRY R. ELLIS AUSA ERIC P. BACAJ U.S. Attorney's Office P.O. Box 1713 Charleston, WV 25326-1713
For the Defendants:	MICHAEL W. CAREY, ESQ. S. BENJAMIN BRYANT, ESQ. Carey Scott Douglas & Kessler P. O. Box 913 Charleston, WV 25323  ROBERT B. ALLEN, ESQ. PAMELA C. DEEM, ESQ. SAMUEL D. MARSH, ESQ. Kay Casto & Chaney P. O. Box 2031 Charleston, WV 25327-2031

APPEARANCES CONTINUED:

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Court Reporter: Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1           PARTIAL PROCEEDINGS had before The Honorable Thomas E.  
2 Johnston, Judge, United States District Court, Southern District  
3 of West Virginia, in Charleston, West Virginia, on January 5,  
4 2014, as follows:

5           (Prior proceeding preceded the following; filed under  
6 separate cover).

7           THE COURT: So let's go back to my original question,  
8 which is, we're going to, I presume, be able to proceed by  
9 proffer today. What kind of information do we need to get into  
10 the record by way of proffer?

11          Mr. Allen?

12          MR. ALLEN: Can I have just one second, Your Honor?

13          THE COURT: You may.

14          (Pause).

15          MR. WILKINS: Your Honor, I don't think there's a  
16 dispute that there were over 300,000 people in the nine-county  
17 area in West Virginia affected by this chemical spill and that we  
18 suggest, although we haven't taken depositions, that the United  
19 States Attorney and his family, his staff members and their  
20 families, were all affected, just as the other 300,000-plus  
21 citizens of West Virginians were affected. I think --

22          THE COURT: I'm sorry, Judge Wilkins. Let me ask you  
23 this question. This is the other thing I wanted to talk with you  
24 about a little bit before we proceeded. Many of these same  
25 arguments would apply to me.

1 MR. WILKINS: Yes, they would.

2 THE COURT: And --

3 MR. WILKINS: But we'd waive --

4 THE COURT: You haven't moved to disqualify me yet.

5 MR. WILKINS: We waive any conflict regarding Your  
6 Honor.

7 THE COURT: Well, just to make the record complete on  
8 that -- I appreciate that. To make the record complete on that,  
9 I live in a place that was unaffected -- the water was unaffected  
10 by this episode and, although I work in this courtroom and water  
11 in the courthouse was obviously affected, we -- my staff and I  
12 will kick in and use bottled water, or the cooler, the big  
13 five-gallon jugs of water. We probably bought a little extra  
14 water during that period of time, but other than that, other than  
15 the general way in which the building was affected, I wasn't  
16 personally affected.

17 My children were off school for awhile, but they seemed to  
18 like that. So, other than that, I -- there was no personal  
19 effect on me. So, and I think that, unless you're speaking in  
20 broader terms, there were at least -- I know several of the  
21 members of the U. S. Attorney's Office, including the U. S.  
22 Attorney and some of his leadership, and I have a general idea of  
23 where they live, and I also know that at least some of them  
24 probably were similarly situated to me, in that they did not  
25 personally in their homes lose the use of their water. I add all

1 that for -- I understand your waiver, but I want to make all of  
2 that clear on the record.

3 MR. WILKINS: Well, thank you, Your Honor. What we say  
4 in our motion is that everyone in the U. S. Attorney's Office was  
5 affected by this crisis and we think that to be a true statement.  
6 It has not -- it has not been denied. So we offer that as a  
7 proffer, as well. We can get beyond the fact that, well, maybe  
8 there was one or two here that weren't affected or not, I don't  
9 know that, but a great majority of all the members of the U. S.  
10 Attorney's Office, we believe, and their families were affected,  
11 like the other 300,000-plus people were.

12 THE COURT: All right. Well, let's continue down the  
13 proffer road then. Are there any other facts that the defense  
14 wishes to proffer for my consideration of this motion?

15 MR. WILKINS: I don't think so, Your Honor.

16 THE COURT: Mr. Carey?

17 MR. CAREY: Your Honor, just by way of supplementing  
18 what Mr. Wilkins has said, and that is, it is our position that  
19 anyone who either worked in the office at a time in which it was  
20 affected by the water crisis, or lived in the area at the time  
21 the -- and their families lived in the area, or they had  
22 relatives in the area that were affected by it, constitute  
23 victims in this case.

24 I, too, have discussed this issue of waiver in relation to  
25 the Court and my client consents to a waiver of any conflict of

1 the Court hearing this matter and proceeding in this case.  
2 However, we don't believe that the U. S. Attorney's Office should  
3 continue in this case because of the conflict.

4 And so, unless there's some dispute that this office was  
5 disrupted and; that is, the Charleston Office, and the members of  
6 their staff who live in this area were also disrupted, then I  
7 believe that's sufficient.

8 THE COURT: I would add to the comments about the  
9 Court, that I have examined the consolidated amended complaint in  
10 the cases pending before Judge Copenhaver and the class that has  
11 been proposed in that amended complaint excludes the Court and  
12 its personnel. So that's already in the Court's record in the  
13 other case.

14 Mr. Wright, do you or the government have any facts that you  
15 wish to proffer? I'm going to have some questions along the  
16 lines of a proffer here in a moment, but I wanted to see if you  
17 all have anything you want to proffer.

18 MR. WRIGHT: I don't have anything I want to proffer,  
19 Your Honor, but I don't want it to be viewed that the United  
20 States agrees with their version of the facts in terms of what's,  
21 in effect, just as affected as 300,000 people. We dispute that.  
22 "Disrupted"? What does that mean? All of those things, Your  
23 Honor, we don't agree with, at least to the extent that they're  
24 trying to argue that we should not be the prosecutors in this  
25 case.

1           Now, Your Honor mentioned some level of effect to the Court.  
2           Our position is, we were no more affected by this than you were,  
3           but I would also point out, Your Honor, even if they waived --

4                   THE COURT: Well, that depends, doesn't it? That  
5           depends. I mean, I've been looking at the law on this, or the  
6           lack thereof, and I'm trying to sort through what's important and  
7           what's not, but there's -- you lost your water at your home,  
8           didn't you?

9                   MR. WRIGHT: Yes, Your Honor.

10                  THE COURT: I didn't. That may or may not be an  
11           important distinction, but -- and, under the law right now, I'm  
12           not sure if it is or not, but it's the kind of thing I'm trying  
13           to flush out here. There's no question then that you were more  
14           impacted by this than I was.

15                  MR. WRIGHT: Well, Your Honor, what I was referring to  
16           is the specific sentence in, I think it's the reply memorandum of  
17           Mr. Farrell, that because this building was closed, that alone  
18           makes us a victim and, in that sense, we're no more a victim than  
19           you were.

20                  Your Honor, I also point this out. If the entire U. S.  
21           Attorney's Office is recused, the entire office, because the  
22           entire office is victim, is a victim, then that would include  
23           your wife.

24                  And I don't know that a defendant can waive a conflict of  
25           interest by a judge. We don't believe that there is one. Not

1 for a second do we agree that there is one. We don't even think  
2 that they can waive that.

3 THE COURT: Well, that gets back to my threshold  
4 comments about the Court. As probably most of you are aware, my  
5 wife is an Assistant U. S. Attorney in this office, so that --  
6 does that change -- I know Mr. Carey and Mr. Allen both are aware  
7 of that. Does that change the analysis with regard to the Court?

8 MR. CAREY: It does not, Your Honor, and that is an  
9 issue I specifically addressed with my client and he still wishes  
10 to waive it.

11 MR. ALLEN: Likewise, Your Honor, we do not see that as  
12 a problem whatsoever. I understand she's in the Huntington  
13 office anyway, I think, isn't she?

14 THE COURT: No. She's --

15 MR. ALLEN: She's back here now?

16 THE COURT: She's been back in Charleston for a little  
17 while.

18 MR. ALLEN: Okay.

19 THE COURT: Well, aside from being in the office, she's  
20 obviously situated in the same way that I am, in terms of the  
21 information I gave earlier.

22 Well, obviously, the main office of the U. S. Attorney's  
23 Office in this district is here in this building. This building  
24 -- the water in this building was affected, as well as many other  
25 homes and businesses in the area. I mean, that is what it is. I



1 was here for it. I know what happened.

2 Let me -- let me move on. I think the way that individuals  
3 were personally affected may make a difference in this, among  
4 other things, because of the phrasing of the amended complaint in  
5 the class action. So I think it's important to establish, at  
6 least for some of the individuals in the U. S. Attorney's Office,  
7 whether or not the water in their homes was actually affected.

8 Mr. Wright, we have already established that yours was.

9 Mr. Ellis, I believe in the area where you live, it was  
10 probably not affected; is that correct?

11 MR. ELLIS: It was not, Your Honor.

12 THE COURT: Okay. Mr. Bacaj, were you even here then?

13 MR. BACAJ: No, I was not, Your Honor.

14 THE COURT: Okay, fair enough. Now, I understand, and  
15 this is just based on my personal knowledge, Mr. Wright, that  
16 both the U. S. Attorney and its First Assistant were probably  
17 affected. Their waters at their homes were probably both  
18 affected; is that correct?

19 MR. WRIGHT: I believe that's correct, Your Honor.

20 THE COURT: Okay. Now, under those -- can we agree  
21 that for people who -- whose homes were affected, they needed to  
22 -- and this is -- this was your personal experience. Mr. Wright,  
23 you may have handled it differently than somebody else, but  
24 anybody who was affected had to get water somewhere, and had to  
25 bathe somewhere, and had to wash their clothes somewhere, and had

1 to procure water for drinking and for food somewhere, correct?

2 MR. WRIGHT: Yes, Your Honor, but that doesn't  
3 necessarily mean that we couldn't do certain things and had to  
4 leave our house just to take a shower.

5 THE COURT: Well, that's not my point. My point is,  
6 and this is -- I've looked at the -- I've looked at the -- I  
7 guess, the extended clause in the consolidated amended complaint  
8 in the cases pending before Judge Copenhaver. One of the clauses  
9 in the damage part of the complaint seeks an award of damages or  
10 mechanism for recovery for class members who incurred costs for  
11 water replacement, travel, water heater appliance, or plumbing  
12 repair or replacement, and any other out-of-pocket expenses as a  
13 result of the defendant's conduct, acts or omissions. It seems  
14 to me that, in terms of at least water replacement, anybody who  
15 was affected by this had to find water somewhere else, did they  
16 not?

17 MR. WRIGHT: Yes, Your Honor, but that doesn't  
18 necessarily mean we incurred costs.

19 THE COURT: Well, I guess I suppose that's true,  
20 because there were some who -- there were some neighborly folks  
21 who gave water to their friends and family, and then there were  
22 certain -- there were certain charitable organizations, as well  
23 maybe the state government, who procured water to give to  
24 residents for free. However, I'm sure there were others who  
25 incurred some expenses in that.

1 I guess my point is that the consolidated complaint is very  
2 broadly worded in terms of potential damages and those who could  
3 potentially be class members and that's the reason I'm asking  
4 these questions about individual members of the U. S. Attorney's  
5 Office and how they may have been impacted by it.

6 Does anybody want to add anything in terms of a proffer of  
7 facts based on the discussion we have had?

8 MR. ALLEN: I would just add that Mr. Tony Majestro, in  
9 the state actions that were removed and are pending before Judge  
10 Copenhaver, and then there's a request for remand pending, also,  
11 but he filed a proof of claim on behalf of certain individuals,  
12 as well as certain businesses, and all of those similarly  
13 situated. So there was some representation by the U. S.  
14 Attorney's Office that, you know, there's no bankruptcy issues  
15 because nobody filed a proof of claim. Tony Majestro filed one  
16 on behalf of all of those people. I would make that proffer.

17 THE COURT: All right.

18 MR. ALLEN: It would include everybody in the U. S.  
19 Attorney's Office.

20 MR. WRIGHT: Your Honor, the only thing I would add is  
21 that the prayer for relief also includes other factors, which I  
22 believe members of the U. S. Attorney's Office and his staff were  
23 also exposed to in potential claims before, and that is a prayer  
24 for relief, Subparagraph 9, an award for damages and mechanism  
25 for recovery to compensate for loss and use of enjoyment of

1 property, annoyance, nuisance, aggravation and inconvenience, and  
2 under 10, an award of punitive damages for all of those who were  
3 exposed to crude MCHM; in other words, if any of the members of  
4 the U. S. Attorney's Office drank the water before the Do Not Use  
5 went out, but before the time in which they were exposed to it,  
6 they might have a claim and, also, an order establishing a  
7 medical monitoring program, any of the people, particularly if  
8 children were involved, would certainly be interested in pursuing  
9 participation in a medical monitoring process relating to any  
10 exposure of MCHM. So there are ways in which members of the U.  
11 S. Attorney's Office were exposed and suffered harm and potential  
12 claims, just like the general public did, beyond just buying  
13 bottled water and traveling elsewhere to wash clothes or get  
14 showers.

15 THE COURT: Well, my goal was to get proffers in the  
16 record first and then hear argument. We've kind of drifted into  
17 argument here, but does anybody else have anything to proffer in  
18 terms of facts?

19 MR. WRIGHT: Nothing to proffer, Your Honor, but I  
20 would make this note about any facts. If it's going to come down  
21 to facts, it would require a mini trial with every AUSA and the  
22 U. S. Attorney in the office about how much did you spend? How  
23 much was your water bill lowered by the fact that you weren't  
24 using the water? How much gas did you spend? How could you  
25 actually compute what you would have spent on gas if you had done

1 something else other than go to a water distribution site to get  
2 free water? All of those things are going to be extremely  
3 complicated.

4 Our point is that none of that rises legally to the point  
5 where this Court can, under the due process clause, recuse this  
6 office and that would be our legal argument that I'm prepared to  
7 get into when we get to that.

8 THE COURT: Yes. Let's get into the legal arguments  
9 now, because I have some questions about this, but I think it's  
10 better, at this point, to leave the legal argument and, Mr.  
11 Allen, or whoever wants to go first on the defense side, it's  
12 your all's motion.

13 MR. ALLEN: Mr. Wilkins would like to present our  
14 motion before the Court.

15 THE COURT: All right. Fair enough.

16 MR. WILKINS: May I approach the podium?

17 THE COURT: You may.

18 MR. WILKINS: May it please the Court. On December the  
19 17th, the U. S. Attorney held a press conference and he made the  
20 statement, "It's hard to overstate" --

21 MR. WRIGHT: Your Honor, I apologize for this, but I'm  
22 not sure that mic is on and I'm having difficulty hearing Mr.  
23 Wilkins.

24 THE COURT: Yes. It doesn't seem like it is on.

25 MR. WRIGHT: If I may step up, Your Honor, I think --

1 MR. WILKINS: The button may be --

2 THE COURT: There we go.

3 MR. WILKINS: On December the 17th, the United States  
4 Attorney issued this press release, a press release, and he  
5 stated, "It's hard to overstate the disruption that results when  
6 300,000 people suddenly lose clean water."

7 In the amended motion to recuse and disqualify, Mr. Allen  
8 wrote in part, and perhaps, now we need to say almost every  
9 person in the United States Office was an actual victim. "Every  
10 person," he writes, "in the United States Office suffered the  
11 same hardships as -- generally speaking, as 300,000-plus victims.  
12 Everyone in the U. S. Attorney's Office was affected at work and  
13 many of them, including their families, were affected at home.  
14 Every employee of the United States Attorney's Office was in the  
15 same position as everyone else mired in this crisis and their  
16 families were also actual victims."

17 Now, in response to this, in their papers they filed, the U.  
18 S. Attorney says, well, we weren't really actual victims because,  
19 "because" is important, because when a violation of the Clean  
20 Water Act occurs, the general public are the real victims. Well,  
21 I guess, as a general statement, that may be true but, in fact,  
22 along with many others, the U. S. Attorney's staff suffered  
23 specific harms, including, including, as was just pointed out,  
24 the sort of aggravation and inconvenience, which I must suggest,  
25 Your Honor, will apply just about across the board to anyone

1 affected by the water crisis.

2 And I know that the Court well knows that the presence of an  
3 interested prosecutor is a fundamental error that undermines  
4 confidence of the integrity of our criminal proceedings. Because  
5 of the fundamental nature of this error, because of the  
6 fundamental nature, Courts do not even engage in harmless error  
7 or prejudicial analysis. The government responds by saying  
8 recusal would create a dangerous precedent. It then rings a  
9 false alarm bell by saying the U. S. Attorney in Boston would be  
10 prohibited from prosecuting the Marathon Bomber. We're not  
11 saying that at all.

12 What we are saying is the U. S. Attorney, or his family, or  
13 members of his staff, have been injured by that explosion. The  
14 U. S. Attorney has a lot of responsibility to seek forth a  
15 recusal and failing so, a Court should step in and order it done  
16 for the simple reason recognized time and time again. This is to  
17 prevent the appearance of a conflict or to prevent the loss, the  
18 appearance of the loss, of impartiality.

19 On Page 9 of its response, the government quotes from our  
20 motion where Mr. Allen states that, "Members of the United States  
21 Attorney's Office and their families," and I quote, "are among  
22 the residents who were affected by the water crisis and thus are  
23 included in a potential class of plaintiffs in various civil  
24 actions that have been filed."

25 Now, rather than acknowledge the obvious, and that is, well,

1 yes, that is a real possibility, the U. S. Attorneys resist by  
2 saying, well, we can't control what private attorneys do bringing  
3 private lawsuits. No class has yet been certified, and it will  
4 be years before these class actions have been concluded, class  
5 actions, again, based in part on the aggravation and  
6 inconvenience, a cause of action, if you study the papers  
7 submitted by the government, a cause of action that it fails to  
8 recognize and address.

9 Now, in the first motion to recuse or disqualify, Mr. Allen  
10 filed it two days after the -- before the indictment was handed  
11 down, but after the criminal complaint had been filed. In that  
12 motion, Mr. Allen states that Mr. Southern has been singled out  
13 and charged with wire fraud based on an ECF filing.

14 Mr. Allen goes on to state, "The government was fully aware  
15 that he, acting as Mr. Southern's attorney, made that ECF filing  
16 and that the government has attempted to deprive Mr. Southern of  
17 his Sixth Amendment right to counsel of his choice." In its  
18 complaint, the government used the words "wire fraud", and so Mr.  
19 Allen used the same words in filing that first motion.

20 First of all, Your Honor, it is incredible that the  
21 government will seek an indictment based on electronic court  
22 filings by someone's attorney. Equally incredible is the  
23 government's response to this.

24 The government claims Mr. Allen, and quote from their  
25 papers, "misstates the facts". So, how did he misstate the



1 facts? The government says he misstated the facts because he  
2 used the words "wire fraud" and not "bankruptcy fraud", as if  
3 that makes a difference.

4 What does make a difference, is that while the government  
5 was splitting hairs about things like "wire fraud" and  
6 "bankruptcy fraud", the government does not deny anywhere that it  
7 was attempting to deny Mr. Southern of his Sixth Amendment right  
8 to counsel of his choice, and that is because now, as the case  
9 goes forward, Mr. Allen will be compelled to be a witness.  
10 That's primarily the reason I'm here today.

11 Finally, Your Honor, while I think it is abundantly clear  
12 that a conflict exists or, at the very least, the appearance of a  
13 conflict exists and, if that is the case, the Court now has  
14 addressed the issue of whether the U. S. Attorney has  
15 demonstrated a loss of impartiality, which would also require  
16 disqualification of his office.

17 Nevertheless, in closing, I'd just like to make two very  
18 brief comments about that. In its response on Page 17, the  
19 government emphasizes, and I quote, "The United States Attorney  
20 did not opine on Southern's guilt and that he has complied with  
21 the Rules of Professional Conduct and DOJ policy governing extra  
22 judicial statements."

23 But did they follow these rules of policies when, in a press  
24 release, he said, "We need to make it crystal clear that those  
25 who engage in this kind of criminal behavior that led to this

1 crisis must be held accountable." What is crystal clear is that  
2 during the press conference when this statement was made, he was  
3 referring to Mr. Southern and the three other co-defendants who  
4 were named in the indictment that had just been filed within a  
5 few hours. The purpose for which the press conference had been  
6 called was to publicly announce this indictment of Mr. Southern  
7 and three others. It was crystal clear that the United States  
8 Attorney was publicly claiming that Mr. Southern was guilty of  
9 criminal conduct.

10 And, finally, the government goes on. On Page 22 of its  
11 response, a public document, talking about Mr. Southern,  
12 references not made to alleged misconduct, but rather, the  
13 government boldly asserts, and I quote, "The U. S. Attorney's  
14 Office has the most extensive knowledge of the evidence of his,  
15 Mr. Southern's, crime. It has the most extensive knowledge of  
16 his crimes." All of this is has clearly crossed the line and, if  
17 it has not crossed the line, Your Honor, there is not one. Thank  
18 you.

19 THE COURT: Thank you, sir.

20 Mr. Carey?

21 MR. CAREY: May it please the Court, counsel, I'll do  
22 my best not to replicate the arguments of Mr. Wilkins, but what I  
23 would like to do at first is discuss what I believe is the policy  
24 and the basis for the line of cases that deal with the issue of  
25 whether a prosecutor should be recused in a certain case.

1           The best discussion I've seen is the U. S. Supreme Court  
2 case in *Young* in which Louis Vuitton lawyers were appointed by  
3 the District Court to prosecute a contaminate that he believed  
4 occurred in relation to one of his orders, and the Supreme Court  
5 reversed that appointment of the Louis Vuitton lawyers and did so  
6 based on a very thorough analysis of the role of a prosecutor.  
7 They first looked to the *Burger* case and said that an obligation  
8 of a prosecutor is unique. It's not to win the case, but to see  
9 that justice is done and, because of that unique responsibility,  
10 federal prosecutors are prohibited from representing the  
11 government in any matter in which they, their family, or business  
12 associates have an interest.

13           And then the Court goes on to enumerate a myriad of  
14 responsibilities that involve the discretion and judgment of the  
15 U. S. Attorney that is unseen and unsupervised by the courts.  
16 The prosecutor determines who will be the targets. The  
17 prosecutor determines who will get immunity, who to charge, what  
18 pleas will be offered, and what charges to actually bring.

19           And, because of that, the Court said, relying on *Marshall v.*  
20 *Jerrico*, that a disinterested prosecutor is required because a  
21 scheme injecting a personal interest, financial or otherwise, and  
22 so it doesn't have to just be financial, into the enforcement of  
23 process may bring irrelevant or impermissible factors into the  
24 prosecutorial decision making process.

25           Now, in that case, that is the *Young* case, the Court, the U.

1 S. Supreme Court found that the Louis Vuitton lawyers had a  
2 conflict because they worked for a company who would benefit from  
3 the enforcement of a contempt action. The Court then looked at  
4 whether, in fact, once a conflict is determined, do we have to  
5 conduct a harmless error review, and the Supreme Court said that  
6 we have previously held that some errors are so fundamental and  
7 pervasive that they require reversal without regard to the  
8 particular circumstances of the conflict and whether it actually  
9 resulted in any harm. They said an error is fundamental if it  
10 undermines the confidence and the integrity of a criminal  
11 proceeding, and the Court stated affirmatively that the  
12 appointment of an interested prosecutor raises such doubt.

13 And they use terms like "interested prosecutor". They don't  
14 say "those limited to a financial claim". They say "interested  
15 prosecutors" and, thus, they say, "Prosecution by someone with  
16 conflicting loyalties calls into question the objectivity of  
17 those charged with bringing a defendant to judgment."

18 The Court further stated, "It is a fundamental premise of our  
19 society that the State wields its former criminal enforcement  
20 powers in a rigorously disinterested fashion, for liberty itself  
21 may be at stake in such matters," as it is here.

22 Furthermore, they state, "The appointment of an interested  
23 prosecutor creates an appearance of impropriety that diminishes  
24 faith in the fairness of the criminal justice system."

25 Now, in this case, in the government's brief, they do

1 recognize, at least this portion of the *Young* holding that was  
2 followed in *Sigillito*, they state, "In the absence of an actual  
3 conflict of interest, no prosecutor or staff employee should be  
4 disqualified from this case," and cited *Sigillito*. They don't  
5 address whether the appearance of conflict is sufficient in this  
6 case, but they do agree that if there is an actual conflict, then  
7 they should be disqualified.

8 Now, the government contends they are not victims because  
9 they say that the Clean Water Act is a public welfare statute and  
10 that the, quote, "victim", is the public. Well, they cite the  
11 *Hanousek* -- if I'm pronouncing it right -- case for that  
12 proposition, and that's not what the case says.

13 The case says that a public welfare -- public welfare  
14 legislation is designed to protect the public from harmful or  
15 injurious items, but in this case, those persons harmed or  
16 injured are 300,000 specifically delineated people, including the  
17 Prosecutor's Office, and why we know that, all we have to do is  
18 look to the indictment itself.

19 In Paragraphs 10-13, it states that, "MCHM leaked from the  
20 facility, migrated to the Elk River, passed through the West  
21 Virginia American Water purification system," resulting in a,  
22 quote, "Do Not Use directive that denied clean water for  
23 drinking, cooking and washing for 300,000 people in a nine-county  
24 area for several days."

25 The U. S. Attorney, at his press conference said, "Freedom

1 Industry's flagrant disregard of the law allowed the tank to fall  
2 into disrepair, causing a spill which affected 300,000 people."  
3 He didn't say "the public". He said the "300,000 people," the  
4 300,000 people that are specifically referenced in the  
5 indictment.

6 And, as Judge -- as Mr. Wilkins has said, the U. S. Attorney  
7 in his press release said, "It's hard to overstate the disruption  
8 that results when 300,000 people suddenly lose clean water."  
9 They want their cake and eat it, too. This caused a disruption  
10 that you cannot overstate, but now they want to say, well, those  
11 of us in the office and those of us who lived were minimally  
12 disturbed. If can't state the disruption, it applies across the  
13 board, Your Honor.

14 And, notwithstanding this allegation, they continue to argue  
15 they are not victims. The Crime Victim and Witness Protection  
16 Act defines a crime victim as "a person who is directly and  
17 proximately harmed as a result of a commission of a federal  
18 offense," and that's exactly what you have here, 300,000 people  
19 who they allege were harmed as a result of this criminal offense.

20 And Congress created substantial rights for the victims  
21 because they have significant interest in the outcome of the  
22 case. They get notice of all significant proceedings. They are  
23 notified of trial dates. They are given an opportunity, upon  
24 conviction, to speak at the time of sentencing under the control  
25 of the Court, and so the victim is an interested party throughout

1 the process and they are victims in this case. Each and every  
2 person who worked in this office or lived in the residential area  
3 affected are victims in this case.

4 Ostensively, they could not drink the water. They could not  
5 cook. They could not bathe. They smelled the bad odor. Again,  
6 the U. S. Attorney himself said you cannot overstate the  
7 disruption.

8 Also, they are class -- punitive class members to a  
9 multitude of class actions, one of which is the *Good* (phonetic)  
10 case, which the Court has already referenced, that identifies  
11 four claims. Physical personal injury torts, and we don't know  
12 whether any of the members of the U. S. Attorney's Office have  
13 claimed physical injury; a non-physical tort claim; property  
14 damage; and financial.

15 Did they have to buy water? Did they have to travel out of  
16 town to bathe? Interestingly enough, they make the assertion  
17 that none of the members of the staff suffered any injuries  
18 identified in Categories 1, 3 or 4, but they make no reference to  
19 item number 2, which is non-physical tort claims, like  
20 aggravation and inconvenience and, if you look in the *Good* case,  
21 in the addendum clause, and the prayer for relief, and it's also  
22 in the body, they claim that all of the -- the complaint asserts  
23 that all 300,000 people are similarly situated because they all  
24 suffered the same aggravation and inconvenience and they're  
25 asking for damages to pay for the aggravation and inconvenience.

1           THE COURT: Let's just be clear about one point. I  
2 remember from my civil practice that aggravation and  
3 inconvenience are items of damages. They're not causes of  
4 action.

5           MR. CAREY: That's correct. That's correct. And they  
6 are items of damages because, in this case, they've alleged a  
7 negligent discharge of a pollutant into a water stream that went  
8 into the use of our homes, resulting in a Do Not Use directive  
9 preventing them from using the water. One of the damages  
10 resulting from that negligent discharge is aggravation and  
11 inconvenience. So it is a claimed element of damages.

12           Now, are they going to say that no one bought water from the  
13 stores? No one traveled? Are they going to refuse to  
14 participate in a class action settlement for their staff for a  
15 portion of the damages or aggravation and convenience? Are they  
16 going to say that no members of their staff are going to  
17 participate in medical monitoring that could go years into the  
18 future and which would be substantial -- or that would be very  
19 expensive?

20           Regardless of those financial issues, they, too, are simply  
21 victims of this thing and, thus, they have a different  
22 perspective than an unbiased neutral prosecutor. As a victim,  
23 they have a special interest in the outcome of the case, which at  
24 anytime, could affect their decision making and, as *Young* said,  
25 once a conflict is determined to exist, the Court does not weigh



1 the gravity of the conflict. The existence of the conflict  
2 requires recusal.

3 And, finally, recusal is also required because of the  
4 appearance of the conflict. In this case, the public has  
5 recognized that the U. S. Attorney's Office is in no different  
6 position than the 300,000 who were affected.

7 In the interview the U. S. Attorney participated in with  
8 Hoppy Kercheval, Mr. Kercheval said, "This was a huge deal. You  
9 lived there. You're among those who couldn't use the water. A  
10 lot of West Virginians could not use the water. This is a big  
11 deal. This is a big deal. And so this is the latest step on  
12 that. That's not much of a question. That's just a comment," to  
13 which the U. S. Attorney responded, "Sure." He did not deny that  
14 he was part of the people who lived there, who couldn't use the  
15 water, and that it was a big deal. As such, the U. S. Attorney  
16 and his staff have a personal interest in the outcome of this  
17 case and I believe the law requires the recusal of the office.

18 THE COURT: All right. Thank you, Mr. Carey.

19 And, by the way, before we move on to the government, I want  
20 to clear up something that was raised originally, and I think  
21 only in Mr. Southern's motion, and that is, in the original  
22 motion, there was discussion of disqualification, if that's even  
23 the right word, of the law enforcement agencies who investigated  
24 this case. Now, everything since then seems to be focused on the  
25 U. S. Attorney's Office. Are we just talking about the

1 disqualification of the U. S. Attorney's Office and its staff?

2 MR. ALLEN: At this time, we certainly are, Your Honor.

3 THE COURT: All right. So I don't need to worry about  
4 the law enforcement agencies.

5 All right. Let's hear from the government.

6 MR. WRIGHT: Your Honor, the United States Attorney's  
7 Office opposes their motion -- motions. The defendants do not  
8 cite to a Rule of Professional Conduct that would mandate the  
9 recusal of this matter and the defendants do not cite to a  
10 statute that would mandate it. Mr. Southern has, in his reply  
11 memorandum, extensively relied upon the U. S. Attorney's Manual  
12 and we dealt with that at the bench.

13 In my response that I provided to the Court about our  
14 compliance with the U. S. Attorney's Manual and with the  
15 consultation of officers, but I should also note this, that with  
16 respect to the U. S. Attorney's Manual, these former prosecutors  
17 skipped over the very first section of the U. S. Attorney's  
18 Manual, Section 1-1.000. The manual provides only internal  
19 Department of Justice guidance. "It is not intended to, does  
20 not, and may not be relied upon to create any right, substantive  
21 or procedural, enforceable at law by any party in any matter,  
22 civil or criminal," and that provision is not just something that  
23 Courts ignore.

24 We cited to the case of *United States v. Lorenzo*, 995 F.2d  
25 at 1453 from the Ninth Circuit, and there are numerous other

1 cases that cite to that provision and decline to apply the U. S.  
2 Attorney's Manual as a basis for a recusal or for some other  
3 action complained of by a defendant.

4 There was also a discussion in Mr. Southern's reply  
5 memorandum about how this case is similar to the *Oklahoma City*  
6 *Bombing* case, where resume's were apparently solicited by the  
7 Attorney General and some prosecutor, who was not from Oklahoma,  
8 ended up prosecuting the case as the lead Prosecutor.

9 Your Honor, I would refer the Court to, for example, one  
10 published opinion, 955 F. Supp. 1281 (1997), with Chief Judge  
11 Matsch, who presided over the case, right before trial, issued a  
12 pretrial ruling. There are numerous published opinions in the  
13 *United States v. McVeigh* case.

14 The first attorney listed for the government in that case is  
15 United States Attorney Patrick Ryan, Western District of  
16 Oklahoma, where the bombing occurred. Oklahoma City lies in the  
17 Western District.

18 The next attorney listed is Joseph Hartzler, who I think is  
19 the attorney referred to in their briefs as the one selected by  
20 Attorney General Reno to lead the prosecution. He is listed in  
21 every opinion I have seen as a Special Assistant to the United  
22 States Attorney.

23 It is quite clear that the United States Attorney's Office  
24 for the District of Oklahoma, Western District, was not recused  
25 from that case and should not be used as an example, or a

1 precedent, or even something that would influence the Courts to  
2 recuse this office. It's a constitutional issue, Your Honor, and  
3 it involves serious questions of separation of powers.

4 Can the judicial branch of the government step in and  
5 dictate that a certain officer of the United States Attorney's  
6 Office that the United States Attorney himself cannot prosecute  
7 the case where he has been appointed by Congress pursuant to  
8 statute and the authority of the President?

9 THE COURT: Are you really suggesting I don't have the  
10 authority to do this if I find it's appropriate?

11 MR. WRIGHT: I'm suggesting, Your Honor, that you have  
12 to be very, very careful when you do that.

13 THE COURT: I'm always very careful.

14 MR. WRIGHT: I'm just making my argument, Your Honor.  
15 I'm not suggesting that you wouldn't be.

16 THE COURT: Well, but in all seriousness, the tenor of  
17 that point is that you're suggesting that I don't have the  
18 authority to do this at all.

19 MR. WRIGHT: I didn't say that, Your Honor.

20 THE COURT: Which I think puts you out on a bit of a  
21 limb, doesn't it?

22 MR. WRIGHT: I didn't say that, Your Honor. What I'm  
23 saying is that the constitution -- we have to find a due process  
24 violation and what they're alleging there as due process  
25 violations is that because some prosecutors in the office had to

1 drink water out of a bottle for a few days last January, because  
2 some prosecutors in the office had to make special arrangements  
3 to cook, bathe, wash their clothes for a few days last January,  
4 before some prosecutors in the office had to suffer the hardship  
5 of smelling a licorice-like odor and everyone was, quote,  
6 "concerned," that's what's in their motion. That's the gist of  
7 their argument, Your Honor.

8 But what is the standard? They've argued about appearance  
9 and bias, or appearance of impartiality, and some partiality, I  
10 suppose. That's not the standard. Their own case that they  
11 cite, the *Sigillito* case, says that the standard for recusal of a  
12 prosecutor is, is there an actual conflict of interest based on a  
13 personal or financial stake in the outcome.

14 I would refer the Court to case of *Wright v. The United*  
15 *States*, 732 F.2d at 1048. Is the prosecutor using the awful  
16 instruments of the criminal law for the purposes of private gain?  
17 Does the prosecutor have an axe to grind based on the fact that  
18 he serves two masters, that he's under the influence of others?

19 The *Young* case, Your Honor, that is a very unique case.  
20 That's where the Court selected the prosecutor for a contempt  
21 action, and there was much discussion in that case as to whether  
22 the Court has the authority to do that and the Supreme Court  
23 said, yes, in order to vindicate the judicial branch's own  
24 authority, where the U. S. Attorney's Office declines to  
25 prosecute, the Court can appoint one. Well, in that case, they

1 appointed someone who had an interest in the case because he  
2 represented the litigant who was harmed by the allegedly  
3 contemptuous action.

4 That's not what we have here, Your Honor. The equivalent  
5 here would be if you appointed an attorney for someone who filed  
6 a claim or sued Mr. Southern or Mr. Farrell. If you appointed an  
7 attorney for the water company, for example. Not here, not the  
8 presidentially appointed U. S. Attorney. *Ganger*, I'm not sure if  
9 I'm pronouncing it right, *G-a-n-g-e-r v. Peyton*, Fourth Circuit  
10 case, 379 F.2d at 709, the prosecutor was going after a defendant  
11 for an assault charge. He also represented the wife, who was the  
12 victim of that assault, and was divorcing her husband, the  
13 defendant, so the prosecutor was the prosecutor on the assault  
14 case, and the prosecutor represented the wife in the divorce  
15 case, serving two masters.

16 I go back to a case called *Tome v. United States*. It didn't  
17 involve a prosecutor. It's a 1927 case, Your Honor. The mayor  
18 in a judicial or quasi judicial function was levying fines that  
19 funded his salary. He should not have done that. He should have  
20 been recused from overseeing those kinds of actions. He wasn't  
21 even a prosecutor.

22 What is not serving two masters? Well, again, the *Wright*  
23 case gives us an example. There, a prosecutor was married to a  
24 woman who carried out loudly and publicly a campaign against the  
25 defendant to investigate the defendant, and then he married --

1 the prosecutor married this woman. They said that that did not  
2 rise to the level of a due process violation.

3 The standard actual financial stake in the matter, personal  
4 or financial stake in the matter, has some limiting factors, Your  
5 Honor. First, I know the defendants have been using the words  
6 "impartiality", and "unbiased", and "neutral prosecutor".

7 Prosecutors, though, are not held to the same standard of  
8 impartiality that one would expect from a judge, and that's why  
9 it's quite remarkable to hear the defendants say, well, we'll  
10 waive any conflict by the judge, who is supposed to be even more  
11 impartial than a prosecutor. Prosecutors can't be impartial.  
12 They are advocates in an adversary system.

13 And, to quote *Marshall v. Jerrico*, "necessarily permitted to  
14 be zealous in their enforcement of the law." The Supreme Court  
15 in that case said, "The rich requirements of *Tome*," in another  
16 case, "designed for officials performing judicial or quasi  
17 judicial functioning are not applicable to those acting in a  
18 prosecutorial capacity." That's 446 U. S. Reporter at Page 248.

19 Again, from the *Wright* case, "To honestly convince of a  
20 defendant's guilt, the prosecutor is free; indeed, obliged to be  
21 deeply interested in urging that view by any fair means." That's  
22 the *Wright v. United States* case.

23 Another limiting factor here to be applied, Your Honor, is  
24 that the personal or financial stake cannot be remote and  
25 insubstantial. That's a principle enunciated by the Supreme

1 Court in the *Aetna Life Insurance* case and that was cited in  
2 their brief, in which they didn't deal with at all in their  
3 replies or in argument, 475 U. S. at 846. In that case, six  
4 justices of the Alabama Supreme Court who were participants in a  
5 class action did not have to be recused, according to the Supreme  
6 Court. The Court held that, with respect to those six justices,  
7 there's no basis for recusing those justices under the due  
8 process clause based on their not withdrawing from the class  
9 action. While the justices may have had a slight pecuniary  
10 interest, it was impossible to characterize that interest as  
11 direct, personal, substantial and pecuniary. Any interest that  
12 they had was highly speculative and contingent, given that the  
13 trial court had not certified a class that awarded any relief of  
14 a pecuniary nature.

15 There has to be, in other words, some element of  
16 practicality and reality to this idea that the prosecutor should  
17 be recused. Here, the class action, there won't even be a  
18 hearing on whether to certify the class until September, and then  
19 the judgment of the plaintiffs who are actually bringing the  
20 case, it could be years before there's any resolution to the  
21 cases.

22 What they've said, at least in their briefs, is they say the  
23 actual conflict, punitive membership in a class. Well, Your  
24 Honor, I just dealt with that. If six justices, who are required  
25 to be more impartial than any prosecutor should not be recused



1 under the due process clause, I'm not sure why any prosecutor who  
2 might be a member of a class, that might be certified, and that  
3 might come to resolution years from now should also be recused.

4 Claimants in the bankruptcy case, again, Your Honor, if Mr.  
5 Majestro, and I don't know that he has, I haven't seen that, has  
6 filed some claim that would reportedly cover everybody in Kanawha  
7 County and the surrounding counties that were affected by this  
8 so-called water crisis, I can't speak to that, other than to  
9 refer back to the *Aetna* case. But I do know this: That none of  
10 the prosecutors that are involved in this prosecution have filed  
11 a claim in a Bankruptcy Court, and we cannot file a claim in a  
12 Bankruptcy Court given the bar date set by the Bankruptcy Courts,  
13 which I believe passed in August of 2014.

14 Mr. Carey cited to, I believe it's 18 United States Code  
15 Section 3771, a Crime Victims Rights Act statute. It talks about  
16 victims who have been directly and proximately harmed. Your  
17 Honor, we can find no case that has used 18 United States Code  
18 3771, or what might be viewed as a predecessor statute, I believe  
19 it's 42 United States Code 10607, as the basis for a recusal of  
20 the United States Attorney's Office because they fall under that  
21 definition.

22 Would anyone in the United States Attorney's Office be  
23 entitled to restitution? Your Honor, again, I think we would  
24 have to go back and determine whether it's real and substantial,  
25 specifically with respect to restitution. Outside the bounds of

1 a plea agreement, restitution could be awarded in this case, A.,  
2 as a condition of probation; B., as a condition of supervised  
3 release. That's it under -- for the Title 33 offenses.

4 What would be the basis? Under the case law, Your Honor,  
5 going back to *Hughey v. The United States*, a 1990 Supreme Court  
6 case; *United States v. Blake*, 81 F.3d 498, a Fourth Circuit case  
7 that should be familiar to at least Mr. Wilkins, since he  
8 authored the opinion; or the *Freeman* case, 741 F.3d 426, a Fourth  
9 Circuit case from last January. These cases suggest that the  
10 Court could only impose restitution based on conduct underlying  
11 elements of the offense, and they give many examples of how those  
12 restitution statutes are narrowly construed. For example, someone  
13 whose firearm was stolen, but then the defendant is found guilty  
14 of possessing a firearm, is not entitled to restitution for any  
15 damage done to his house while the guy stole a firearm.

16 I point out these cases not to suggest, Your Honor, that the  
17 Court needs to, or should even try, at this point, to figure out  
18 what harms can be said to be directly and proximately caused by  
19 the defendant's conduct if they are to be convicted. It's way  
20 too early for that.

21 I should also note, Your Honor, that there is case law under  
22 the State of West Virginia dealing with the alleged contamination  
23 of public water supply found to be constituting a public  
24 nuisance, not a private nuisance and, in order for a plaintiff to  
25 recover for a public nuisance, the plaintiff must demonstrate a

1 special injury different in kind and degree from that of the  
2 general public. The case I cite for that, Your Honor, is *Rhodes*  
3 *v. E.I. du Pont de Nemours and Company*, 657 F.Supp.2d 751, with a  
4 discussion at 768 and 769, Southern District of West Virginia  
5 from 2009. Their whole argument is predicated that we're no  
6 different from 300,000 other people, the general public.

7 I don't believe that, Your Honor. If you were to look at  
8 all of the claims, there are people who are claiming actual  
9 physical harm. There are people who are claiming that they've  
10 lost their businesses and suffered millions of dollars worth of  
11 damages. No one here is anywhere close to all of those types of  
12 claims.

13 I bring up *Rhodes v. DuPont* in those restitution lines of  
14 cases, Your Honor, only to suggest that even if that were some  
15 slight expectation of restitution, it's too far remote, too  
16 impractical to decide, and too insignificant as a basis for  
17 recusing an entire United States Attorney's Office.

18 The Supreme Court said it in *Aetna Life Insurance*, Your  
19 Honor, quote, "At some point, the *biasing influence will be too*  
20 *remote and insubstantial to violate the constitution.*" *Aetna*  
21 *Life Insurance*, 106 Supreme Court Reporter at 1588, citing  
22 *Marshall v. Jerrico*, a case that they just cited. That's where  
23 we are now, Your Honor.

24 Your Honor, every crime, to some degree or another, affects  
25 everyone in the district, including the prosecutor. Property

1 values go down if you live in a high crime area. If somebody  
2 robs a bank and then he's fleeing and the police or the law  
3 enforcement officers have to shut down sections of the highway in  
4 order to find him, you'll suffer an inconvenience. That could be  
5 significant if you have to get to someplace in a hurry.

6 And we have that example in the *Boston Marathon* case. Four  
7 counts of that indictment, Your Honor, a public record,  
8 specifically cite to the fact that businesses and citizens were  
9 advised not to go out and they had to shut down. That was the  
10 interstate commerce effect for four counts in the *Boston Marathon*  
11 indictment in the City of Watertown and the City of Boston for an  
12 entire day. No one could go anywhere, a tremendous inconvenience  
13 and a financial harm. Nonetheless, the U. S. Attorney's Office  
14 in Boston is not recused and the Department would not recuse  
15 them.

16 Congress, it can be inferred, Your Honor, understood this  
17 when it enacted 28 United States Code Section 545, which requires  
18 the U. S. Attorney, and his assistants, with some limited  
19 exceptions that are not applicable here, to live in the district  
20 to which they are appointed to work in.

21 It is contemplated, even desired, that the federal  
22 prosecutors in the U. S. Attorney's Office understand the  
23 environment in which they live and work, with all of its  
24 hardships and all of its inconveniences, and to simply say that  
25 the prosecutors are affected, they must have lost some money

1 somewhere, they must have suffered some inconvenience, is not  
2 enough. There must be an actual personal or financial stake in  
3 the matter, such as was present in *Young v. Vuitton*, *Ganger v.*  
4 *Peyton*, or the mayor in *Tome v. United States*, a stake that is  
5 not remote, a stake that is substantial, to the extent that the  
6 Court, based on facts in the record, can say that the prosecutor  
7 is serving two masters, that the prosecutor is using the awful  
8 instruments of the criminal law for his private gain.

9 We can find no case, and that's where we made the argument  
10 that it's unprecedented, where a Court has recognized that an  
11 entire U. S. Attorney's Office, in circumstances such as these,  
12 should be recused. We ask the Court not to take such a drastic  
13 step and we ask the Court to deny their motions.

14 THE COURT: All right. I will given the defendants the  
15 last word.

16 MR. CAREY: May it please the Court. They begin by  
17 saying that we have pointed to no statute or regulation that  
18 requires the removal. The common law requires their removal.

19 But it's worth noting that in the *Burger* case, the Court  
20 relied, as part of its analysis, on 18 U. S. C. Section 208,  
21 which makes it a crime for a prosecutor or other government  
22 official to participate or pursue a case in which he or she has a  
23 financial interest.

24 THE COURT: Let me ask you about that, and this is a  
25 question I had going into this, and I think Mr. Wright touched on

1 this considerably in his citation of the *Aetna* case. Does that  
2 interest have to be substantial? In other words, is there a  
3 threshold below which that interest doesn't make a different?

4 MR. CAREY: Under Section 208?

5 THE COURT: Or any part of your argument. I mean, I --  
6 that's the point where I decided to ask the question, so that's  
7 part of it.

8 MR. CAREY: I would think there would be a point where  
9 the connection is so remote, that it is not found -- it is found  
10 not to be a conflict, but I don't believe it's a question of,  
11 well, how much are we harmed? If it's a little bit, you can be  
12 in; if it's a little bit more, you can probably stay in.

13 The *Young* case answered that question. If a conflict is  
14 found, you don't look to the gravity of the offense. If you look  
15 at Page -- I believe it's 809 -- they state, "It is true that we  
16 have indicated that the standards of neutrality for prosecutors  
17 are not necessarily as stringent as those applicable to judicial  
18 or quasi judicial officers. This difference in treatment is  
19 relevant to whether a conflict is found, however -- is found,  
20 however, not to its gravity once identified. We may require a  
21 stronger showing for a prosecutor than a judge in order to  
22 conclude that a conflict exists, but once we have drawn that  
23 conclusion, however, we have deemed the prosecutor subject to  
24 influences that undermine the confidence that a prosecution can  
25 be conducted in a disinterested fashion. If this is the case, we

1 cannot have confidence in a proceeding in which this officer  
2 plays the critical role in preparing and presenting a case for  
3 the defendant's guilt."

4 And let me move to *Aetna*. In *Aetna*, there were members of  
5 the Supreme Court.

6 THE COURT: Of Alabama?

7 MR. CAREY: Of Alabama. The case came before them  
8 involving a question about either finding out whether a bad faith  
9 cause -- or an action against insurance companies exist for a bad  
10 faith handling of a claim, or the extension of a previously  
11 existing found cause of action where there's been a partial  
12 payment of part of the claim, but not the rest of it.

13 While that case was pending, one of the members of the  
14 Alabama Supreme Court filed his own personal case against an  
15 insurance company for bad faith alleging that they hadn't paid  
16 for a mink coat that was damaged or lost.

17 He also filed an additional class action suit on behalf of  
18 all persons who recovered under Blue Cross Blue Shield for faith  
19 claims handling, and the Supreme Court, on review, the U. S.  
20 Supreme Court said, clearly Embry (phonetic), the guy who filed  
21 the lawsuit, the justice who filed the lawsuit over the mink  
22 coat, who wrote the per curiam opinion extending the law that  
23 really made his claim viable and in which he settled for  
24 \$30,000.00 afterwards, had a conflict, but they said, as to those  
25 who were, quote, "covered by the allegations in the class action

1 suit," the Court noted that all the judges in Alabama are covered  
2 by Blue Cross Blue Shield. They said out of the rule of  
3 necessity, we bar recusal, and they said there's nothing in the  
4 -- there was nothing in the record that any of the individual  
5 justices had a bad faith claim.

6 So, they said their claim, if it existed at all, is too  
7 speculative, at this point. We can't say. It's too far down the  
8 road.

9 In this case, we know that the U. S. Attorney's Office was  
10 affected. It's not a question of speculation whether they were  
11 affected. And there's no question that they are within that  
12 group of people who have claims for aggravation and  
13 inconvenience, perhaps economic damages for travel to obtain  
14 water or go to get -- for bathing or to buy water and other  
15 things. So, these are claims, and you don't say that's too  
16 diminimous.

17 And I find it amazing --

18 THE COURT: Well, let me ask you a question to sort of  
19 flush that out, because I'm really interested in this issue of  
20 whether or not it's too diminimous. Let's say that -- and this  
21 is hypothetical, and I know it's going to sound a little  
22 ridiculous, but it will get to my point.

23 Let's say that Mr. Goodwin, in the entire course of the  
24 water crisis, bought one bottle of water, paid a buck-ninety-nine  
25 for one bottle of water. All right? Is that substantial enough



1 to disqualify him from this case?

2 MR. CAREY: If that's the only thing, and you take out  
3 the fact that he had the aggravation and inconvenience of having  
4 his office closed, if you take out the aggravation and  
5 inconvenience for dealing with the issues that arose from that,  
6 if you take out the fact that there may be some claim down the  
7 road for medical monitoring because he may have drank the water.

8 I mean, there are all kinds of factors that come into play  
9 here that you can't just isolate and say one bottle of water  
10 isn't enough. I don't know.

11 THE COURT: Well, you're missing the point of my  
12 question, though. I'm trying to figure out if this is -- if what  
13 you're advocating is an absolute, or if it's a question of  
14 degree.

15 Let's say he wasn't annoyed and inconvenienced. Now, he's  
16 kind of a happy-go-lucky guy, so he wasn't annoyed or  
17 inconvenienced, and let's say he didn't drink any of the water  
18 with MCHM in it, and let's say, therefore, he doesn't need  
19 medical monitoring. All he did was buy one bottle of water.

20 MR. CAREY: Two points. One is, you simply look to  
21 what the facts are to determine whether there is a conflict.  
22 Now, I don't know whether you take evidence on all of those  
23 issues that you've just postulated and said that doesn't rise to  
24 a level of conflict.

25 What we do know, because what the cases have said, once you

1 determine a conflict, you don't look at the gravity of it and,  
2 more importantly, and this is, in part, an answer to your  
3 question, they want to suggest that you have to look at whether  
4 the prosecutor was using the awful instruments of his office in  
5 some former retaliation.

6 The Supreme Court in *Young* specifically rejected that. We  
7 don't look to the gravity, nor do we look at harmless error. We  
8 don't determine whether there was prejudice. It's because of the  
9 appearance that a prosecutor is not disinterested.

10 THE COURT: So your position is that this is an  
11 absolute and it's not a question of degrees?

12 MR. CAREY: Yes.

13 THE COURT: All right.

14 MR. CAREY: I agree.

15 THE COURT: Fair enough.

16 MR. CAREY: That is all.

17 There's also a point, which they've left out, and they've  
18 said, well, this class action is way down the road and who knows  
19 whether anyone is going to get a claim.

20 Well, the point is also this, that if Mr. Farrell and Mr.  
21 Southern are convicted of a crime, then they would not be able to  
22 defend this liability issue in a civil case because the  
23 conviction would be introduced as prima fascia evidence of -- not  
24 prima fascia, as evidence of their guilt on the negligence case.

25 And so, that being said, there is a benefit to pursuing a

1 prosecution against these people, even if restitution were not  
2 available through the federal system. Their assets would be  
3 subject to satisfaction from the judgment. And so there are many  
4 things that can be gained for the benefit of the class through  
5 the criminal prosecution.

6 THE COURT: Well, and could it be argued that a  
7 conviction in this case could enhance the value for settlement  
8 purposes, among other things, of the class action case.

9 MR. CAREY: Yes. Absolutely. Absolutely.

10 Finally, I just want to go back to their statement that they  
11 shouldn't be disqualified because they had to buy a few bottles  
12 of water.

13 I find it amazing that the U. S. Attorney says, "You cannot  
14 overstate the disruption that follows from not having clean  
15 water." He didn't say, "the physical harm to the public." He  
16 didn't say "the illnesses which arise." He has said, "You can't  
17 overstate the disruption," and that's exactly what the claim for  
18 aggravation and inconvenience are. They're claims for the  
19 disruption that arises and they're part of that 300,000.

20 MR. MOORE: May it please the Court. Judge, I'm not  
21 going to repeat everything that Mr. Carey said, because I think  
22 Mr. Carey said a lot of it better than I could, so I'm going to  
23 leave it at that, but there are a few things that I do want to  
24 mention.

25 First of all, Mr. Wright, in his argument, talks about the

1 statute that requires U. S. attorneys to live in the district  
2 where they practice law and where they enforce the law. Of  
3 course, he fails to mention 28 U. S. C. Section 543, which  
4 enables the Attorney General of the United States to send  
5 prosecutors to a district when he deems it appropriate and in the  
6 public interest.

7 Now, I understand Your Honor's ruling, at least at this  
8 stage, about whether we're going to look at other recusal cases,  
9 but it seems to me that the U. S. Attorney is talking out of both  
10 sides of his mouth when he says, we don't need to get into these  
11 other recusal cases but, by the way, let me talk about these  
12 cases where Courts did not order recusals.

13 There were a number of cases, and I could get into those at  
14 the appropriate time, if Your Honor permits, where it's clear on  
15 the record, from Pacer and otherwise, that a recusal has been had  
16 by the United States and where a United States Attorney's Office  
17 has been completely recused.

18 I understand Your Honor is familiar with that practice, but  
19 for them to say, and still continue to say, that it's  
20 unprecedented for a Court to remove a United States Attorney's  
21 Office, that may well be true, because most United States  
22 Attorney's Offices, one expects, follows the procedures in the  
23 United States Attorney's Manual with respect to communication  
24 with the Department of Justice and we hear them talk about the  
25 United States Attorney's Manual and we hear them talk about the

1 fact, in 1.1000, I think is the correct cite, that the U. S.  
2 Attorney's Manual confers no rights on private litigants.

3 I would suggest that they protest too much here. If they  
4 communicated with the Department of Justice and provided the  
5 Department of Justice, prior to charging our client, with all  
6 information that related to their conflict, I doubt we'd be  
7 sitting here today in this same situation.

8 With respect to -- and I guess there's one point that I feel  
9 like I must repeat, because when you listen to Mr. Wright talk  
10 about the minimal impact of this chemical spill on the members of  
11 his office, it is hard to imagine how he can say that out of one  
12 side of his mouth, when the United States Attorney has said,  
13 "It's hard to overstate the disruption that was caused by this  
14 chemical spill."

15 To get to Your Honor's question to Mr. Carey about does --  
16 does the degree of effect matter, we agree with Mr. Carey that it  
17 does not, but Your Honor has already flushed that out, in  
18 questions to Mr. Wright, that Mr. Wright's home was affected to  
19 some degree. And, as I understand it, Mr. Wright supervises Mr.  
20 Ellis, one of the other attorneys in this case.

21 You look at *Sigillito*, it certainly suggests that when a  
22 supervisor in a U. S. Attorney's Office has a conflict, that  
23 conflict is imputed to all of the people that he supervises. If  
24 Mr. Goodwin lives in an area where he did not get water, could  
25 not get water, and his first assistants live in areas where they

1 were personally affected by the inability to get water at their  
2 homes, to bathe at their homes, to wash clothes in their homes,  
3 then every person in that office, because they're supervisors,  
4 their conflict is imputed to everyone else in that office and, if  
5 we have to get to the matter of whether the degree of impact or  
6 injury matters, then we can't take discovery in this case. We  
7 can't depose the United States Attorney, the First Assistant  
8 United States Attorney, members of their families, if that is  
9 necessary.

10 However, we suggest, and we end with, we go back to 18 U. S.  
11 C. Section 3771. It says that, "For all crimes, a person is a  
12 crime victim if they are directly and proximately harmed by the  
13 event that is charged." I do not know how this office can claim  
14 that they are not crime victims. They haven't credibly claimed  
15 that they are not crime victims. And one cannot prosecute a case  
16 where one is also the victim of a crime.

17 It strains common sense to argue that you can be a victim  
18 and prosecute the case, and I know of no precedent, no Court,  
19 that has ever allowed that to happen. That's my concluding  
20 point, Your Honor.

21 THE COURT: Well, you would agree with me that it's  
22 possible for the U. S. Attorney, for example, to be recused from  
23 a matter, but not the rest of the office?

24 MR. MOORE: Yes, sir.

25 THE COURT: That happened to me when I was U. S.

1 Attorney.

2 MR. MOORE: That happens on occasion, depending on the  
3 nature of the conflict. There are occasions when the Justice  
4 Department decides that, based on the United States Attorney's  
5 personal conflict, they will recuse an entire office because --  
6 and it perhaps does --

7 THE COURT: I had both things happen to me when I was  
8 U. S. Attorney. I had one case where I was personally recused,  
9 but the office was not, and my Criminal Chief was appointed as  
10 the acting U. S. Attorney for that case.

11 Another case where I had a conflict, and it was a little bit  
12 different kind of conflict, but they took the whole office off  
13 the case. It happened to me both ways, in that there were  
14 distinctions in those two sets of facts, but you would agree with  
15 me that, at least in some circumstances, the basis of the recusal  
16 does not necessarily extend to the entire office?

17 MR. MOORE: The basis of the recusal does not necessarily  
18 extend to the entire office. However, I would say, Your Honor,  
19 that when the United States Attorney is a victim of a crime and  
20 the First Assistant United States Attorney is the victim of an  
21 alleged crime, and the Supervisory Assistant United States  
22 Attorney who has supervisory authority over the prosecution of  
23 this case is a victim of a crime, in those circumstances, and  
24 then you -- if you looked at the individual conflicts of other  
25 people in the U. S. Attorney's Office, I think you are left with

1 the inescapable conclusion that, in this case, this office must  
2 be in conflict.

3 THE COURT: All right. Does anybody else have any  
4 other argument today?

5 MR. WRIGHT: Your Honor, I'm not going to add argument,  
6 but could I ask the Court, if I may make, just for reference,  
7 exhibits -- as exhibits, the documents that we refer to in our  
8 memo and, specifically, I'm talking about either orders or  
9 pleadings that were filed either in the civil cases or the  
10 bankruptcy case?

11 THE COURT: Is there any objection?

12 MR. CAREY: What was the last one you said?

13 MR. WRIGHT: It would be ECF Document 39.

14 MR. CAREY: I just didn't hear the last word you said.

15 MR. WRIGHT: I referred to them in our memo.

16 MR. CAREY: I have objection.

17 MR. WILKINS: No objection.

18 MR. ALLEN: No objection.

19 THE COURT: All right. Well, those will be -- I will  
20 order that those be placed in the record without objection.

21 All right. We do have this other issue that we discussed  
22 here at the bench. How do we want to tee that up? The  
23 government has filed a Motion to Quash. We can use that as a  
24 vehicle to tee this up. How would we like to proceed?

25 MR. ALLEN: Your Honor, we were served with this just a



1 few moments before this proceeding started. We could file a  
2 response to the Motion to Quash, if the Court would like, and I  
3 wasn't part of the --

4 THE COURT: Well --

5 MR. ALLEN: Excuse me, Judge.

6 THE COURT: Go ahead, Mr. Allen.

7 MR. ALLEN: I wasn't a part of the bench conference, so  
8 I'm not sure exactly what all was discussed up here, so maybe --

9 MR. ALLEN: I think that the bottom line, Your Honor,  
10 is they filed a motion. To tee it up, we could file a response.  
11 In our response, we may go beyond responding simply to the motion  
12 to quash the subpoena of Judge King and deal with the issues of  
13 relevance and deal with the issues of the Rule of Professional  
14 Conduct generally, and then we can proceed.

15 THE COURT: Well, I'm going to give the government an  
16 opportunity to amplify its position on the motion because this is  
17 a two-page motion. That's -- it briefly -- I see it briefly,  
18 very briefly outlines the government's position on this, but I'm  
19 going to give them an opportunity to file a more lengthy  
20 memorandum, and you all may have a response, and they can have a  
21 reply.

22 How much time do you need to file -- first of all, Mr.  
23 Wright, do you want to file an additional memorandum?

24 MR. WRIGHT: Your Honor, if the Court feels like that  
25 that would be necessary to rule on their motions to recuse our

1 office then, yes, we would like, I would say, another ten days, a  
2 week from this coming Friday, to file some sort of memorandum and  
3 I would -- I would like, I have just been informed, after this  
4 hearing started, that there was a subpoena served on another  
5 former United States Attorney, Warren Upton. I haven't seen  
6 that. I wasn't told directly, but I've learned that that  
7 happened and, if that's happened, then we would move to quash  
8 that subpoena under the same grounds.

9 MR. ALLEN: The motion -- or the subpoena served on Mr.  
10 Upton, he was defense counsel. He was not a member of the  
11 Department of Justice at the time of the event that we were going  
12 to ask him about. Bob King was on one side, Warren Upton on the  
13 other side. Both of them relate to the FMC ruling.

14 THE COURT: Well --

15 MR. ALLEN: So the United States would not have been  
16 his client at that time.

17 THE COURT: All right. Well, I'm going to give the  
18 government -- you know, I expressed my reservations about this at  
19 the bench, but the defendants are intent on pursuing this, so I'm  
20 going to give them an opportunity to be heard on it, and I'm not  
21 going to make any findings on it at this time, which means we can  
22 brief this. So, you can have until a week from Friday.

23 How long does the defense need? That would be the 16th.  
24 How long does the defense need after that to file a response --  
25 or responses?

1 MR. ALLEN: Another ten days, Your Honor.

2 THE COURT: All right. So that would be the 26th.

3 MR. ALLEN: Yes, sir.

4 THE COURT: I want to make sure that's a -- is that a  
5 weekday?

6 Okay. Then how long for a reply?

7 MR. WRIGHT: Following Wednesday, Your Honor, the  
8 Wednesday day after they file?

9 THE COURT: Two days later? I'm looking at a -- I  
10 think I'm looking --

11 MR. WRIGHT: Oh, I --

12 THE COURT: 26th is a Monday, so that would be the  
13 28th.

14 MR. WRIGHT: Could we have until Friday, Your Honor?

15 THE COURT: That would be the 30th.

16 MR. WRIGHT: Yes, Your Honor.

17 THE COURT: All right. That's fine. That's fine.

18 All right. Anything else we can take up today?

19 MR. ALLEN: Your Honor, in light of the briefing  
20 schedule and the fact that this motion has not been resolved at  
21 this particular point in time, which we think is of  
22 constitutional magnitude, I would ask that the Court stay all  
23 further proceedings, including the arraignments and so forth of  
24 Mr. Southern, until this matter has been ruled on.

25 THE COURT: Well, first of all, I am going to take the

1 motion for disqualification under advisement. I'm going to deny  
2 that motion. Right now, the only thing I know of that's  
3 scheduled is the arraignment on Thursday. There's not much harm  
4 in re-arraigning somebody, if that becomes necessary and, until  
5 the motion is granted, the U. S. Attorney's Office is still in  
6 this case and the case is going to proceed, and I should say if  
7 and when, until we reach a point where the motion might be  
8 granted, the U. S. Attorney's Office is still in this case.

9 So, we might re-visit that at later time, if it seems  
10 efficient to do so, but I want -- I intend to rule on this as  
11 quickly as possible, for obvious reasons, and so, for right now,  
12 that motion will be denied.

13 Anything else we need to take up today?

14 MR. WRIGHT: May I approach with the exhibits?

15 THE COURT: You may. You can just -- you can do that  
16 after the hearing. Just provide those to the courtroom deputy up  
17 here.

18 All right. Thank you.

19 MR. MOORE: Your Honor, I'm sorry. Just one quick  
20 moment.

21 On this discovery issue, I take it Your Honor will let us  
22 know if you believe that we need an evidentiary hearing or if  
23 Your Honor will consider our request to take discovery from the  
24 United States Attorney's Office; is that correct?

25 THE COURT: You can file a motion as to that and I will

1 consider it.

2 MR. MOORE: Yes, sir.

3 THE COURT: All right.

4 MR. MOORE: Thank you.

5 THE COURT: Thank you.

6 (Proceedings concluded at 3:08 p.m., January 5, 2015.)

7  
8 CERTIFICATION:

9 I, Ayme A. Cochran, Official Court Reporter, certify that  
10 the foregoing is a correct transcript from the record of  
11 proceedings in the matter of United States of America, Plaintiff  
12 v. Dennis P. Farrell & Gary L. Southern, Defendants, Criminal  
13 Action No. 2:14-cr-00264, as reported on January 5, 2015.

14  
15 s/Ayme A. Cochran, RMR, CRR

February 16, 2015

16 Ayme A. Cochran, RMR, CRR

DATE